Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	)	MB Docket No. 17-91
	)	
	)	May 18, 2017
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COMMENTS OF THE INSTITUE FOR LOCAL SELF-RELIANCE, PUBLIC KNOWLEDGE, AND NEXT CENTURY CITIES

I. Introduction

The Institute for Local Self-Reliance (ILSR) mission is to provide innovative strategies, working models and timely information to support environmentally sound and equitable community development. To this end, ILSR works with citizens, activists, policymakers and entrepreneurs to design systems, policies and enterprises that meet local or regional needs; to maximize human, material, natural and financial resources; and to ensure that the benefits of these systems and resources accrue to all local citizens.

Public Knowledge promotes freedom of expression, an open Internet, and access to affordable communications tools and creative works. The organization works at the intersection of copyright, telecommunications, and Internet law, at a time when these fields are converging.

Next Century Cities is a nationwide coalition of more than 170 mayors and local government leaders committed to ensuring the benefits of fast, affordable, reliable broadband Internet access for their communities.

II. Summary

ILSR, Public Knowledge, and Next Century Cities oppose federal preemption of Article 52 of the San Francisco Police Code as requested by the Multifamily Broadband Council in MB Docket No. 17-91. We consider the ordinance a useful local tool to encourage our national goal of competition among Internet service providers (ISPs) and to expand access for residents and businesses inhabiting San Francisco multiple dwelling units (MDUs). The City of San Francisco has the right to exercise this ordinance as a matter of local authority.

III. Article 52 of the Police Code Helps Remove A Significant Barrier to Competition

According to the FCC's Wireline Competition Bureau's June 2016 data based on Form 477 information,[1] competition in general for FCC-defined broadband Internet service (25 Mbps / 3 Mbps) is weak. Only 29 percent of U.S. census blocks have access to two or more ISPs that offer 25 Mbps / 3 Mbps speeds via a residential fixed connection. Thirteen percent of census blocks can choose between three ISPs to deliver those same speeds. Looking back at the legislative history of the 1996 Telecommunications Act, it is clear Congress anticipated more competition than has been achieved.

Choice for tenants in MDU buildings seems to be worse than average. Exclusivity agreements between property owners and ISPs are not legally enforceable under federal law, but the reality is that "de facto" exclusivity agreements occur regularly.[2] Typically, one ISP and the MDU building owner or landlord enter into agreements in which the latter discourages additional ISPs access to the building and its tenants in exchange for a fee of some sort.[3]

These agreements between building owners and ISPs create a "take it or leave it" situation in which tenants are at a disadvantage. When only one provider can enter the building to offer competitive services, an MDU tenant is more likely to be subject to rate increases, poor customer service, and less reliable access from a provider that knows they need not fear competition harming their revenue stream.

These agreements can also discourage new entrants from serving customers. A building owner or landlord who demands an access fee or locks out competition harms tenants. Unfortunately, there is currently no effective market mechanism to differentiate whether a given building manager or landlord allows multiple ISPs to serve tenants. Other large cities face the same problem and new entrants have chosen not to serve tenants in buildings where an owner or landlord requires a special fee from an ISP.[4]

The situation is not limited to old or established structures. New building developers may establish deals with a provider and only install cabling to serve the needs for that one provider. As a result, no other provider is able to serve tenants in the new building because the physical infrastructure is unavailable. The San Francisco ordinance corrects this known approach to circumventing the spirit of the law.[5]

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[1] http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0503/DOC-344499A1.pdf, see Figure 4, p. 6.

[2] https://muninetworks.org/content/san-francisco-passes-ordinance-tenants-have-isp-choice-last and https://muninetworks.org/content/transcript-community-broadband-bits-episode-231.

[3] http://broadbandnow.com/report/apartment-landlords-holding-internet-hostage/.

[4] https://muninetworks.org/content/transcript-community-broadband-bits-episode-245 in which the owner of Boston ISP netBlazr stated that he has also encountered building owners and landlords that demand a fee in order to gain access to their buildings in order to serve tenants.

[5] https://muninetworks.org/content/transcript-community-broadband-bits-episode-197.

IV. MDU Barriers to Competition Benefit the Largest ISPs, Discouraging Competition

Large ISPs have the financial resources to retain large legal departments of lawyers and legal staff, in addition to the funds to retain attorneys with special legal expertise. Large corporate providers have used these types of agreements for years and have developed agreements that suit their needs along with the skills to enforce them. They also understand the best way to market these agreements to entice landlords and building owners.[6]

Small ISPs, which have in recent years expressed interest in serving MDUs in San Francisco and elsewhere, typically don't have in-house counsel or deep pockets for legal advice. Small ISPs recognize the difficulty of legally challenging these complex arrangements and are scared away from such buildings absent clear law that would allow them to establish competition in these MDUs.[7]

As the largest ISPs have grown only larger through consolidation in recent years, small ISPs are essential in creating and preserving competition in the Internet access market. Small companies face special challenges as they attempt to enter a market that is already largely controlled by large corporate ISPs that want to stifle any competition. The FCC should recognize the particular harm that results from large ISPs locking new entrants out of MDUs, which are a significant share of urban markets.

V. Article 52 of the Police Code Empowers MDU Subscribers

ISPs wield an excessive amount of control over the subscriber relationship, which is especially difficult for families and individuals living in MDUs who are on fixed budgets. With no leverage to negotiate terms based on the possibility of switching providers, individuals and families in MDUs are locked in because the owner or landlord of their building has removed their right to choose an ISP. MDU tenants have weaker subscriber rights and negotiating leverage simply because of their living arrangements.

In single-family households across the U.S. in locations where there are more than one provider, potential subscribers are offered comparatively low promotional rates when switching providers. When those promotional periods are over, if subscribers threaten to switch, they are typically enticed with better prices or enhanced bundles. Subscribers whose landlords block all but one provider from entering their building lose negotiating power.

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[6] http://www.kandutsch.com/glossary/mdu-right-of-entry-agreement-bulk-cable-agreement-door-fee-revenue-share.

[7] Charles Barr, founder of Webpass said there are roughly 400 large apartment buildings in San Francisco that deny his company access to their property. 'Some don't want fiber in the building or don't want a radio in the building or don't want anybody other than AT&T to come in,' he said," http://www.sfgate.com/bayarea/article/SF-supervisor-would-give-tenants-access-to-all-9979280.php also See fn2.

The 1996 Telecommunications Act intended all Americans to have a choice in providers. For more than 20 years, MDU tenants have not realized the fruits from this policy goal. San Francisco's policy offers a local tool to change that dynamic. Past federal efforts to encourage competition in MDUs have not succeeded but San Francisco's policy may be able to achieve this national goal at the local level.

VI. San Francisco Should Have Broad Authority to Determine How to Meet Its Local Internet Access Goals

Like many other communities across the U.S., community leaders in San Francisco have come to view Internet access as an "economic right" rather than a nicety.[8] In order to support their approach, the city has taken steps to adopt policies to improve Internet access for residents and businesses. These policies are in line with federal goals and policies. In addition to the MDU ordinance, the community adopted a dig once policy to encourage additional network investment and availability.[9]

As the community researched ways to improve Internet access, it became clear that the scope of the problem of limited access to MDU affected tens of thousands of tenants.[10] According to the National Multifamily Housing Council, 41 percent of San Francisco's population lives in apartments.[11] Article 52 of the Police Code, has the potential of providing choice to a large segment of San Francisco's population.

San Francisco has a strong interest in reducing barriers to Internet infrastructure investment in the ISP market in the interest of its citizens and the community as a whole. The City is creating more opportunity for the private sector by removing a barrier that discourages investment, which is well in line with well-established national goals as well as those of this FCC.

A dense urban center like San Francisco is the type of environment that should attract many ISPs. Article 52 of the Police Code is another local policy that opens the door for more private investment, more competition, and more opportunities for better connectivity in San Francisco.

VII. Conclusion

For the reasons set forth, Article 52 of the Police Code of San Francisco should not be preempted.

Respectfully submitted,
Institute for Local Self-Reliance
Public Knowledge
Next Century Cities

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[8] https://muninetworks.org/content/transcript-community-broadband-bits-episode-231.
[9] San Francisco City & County Public Works Code 2.4.4, 2.4.13 – 2.4.14, 2.4.95 – 2.4.97.
[10] https://muninetworks.org/content/transcript-community-broadband-bits-episode-231.
[11] http://www.nmhc.org/Content.aspx?id=4708 - Large_Cities.